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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 665.

ALBERT L. WIELAND,
Also known as A. L. WIELAND, as Receiver,
Petitioner,

v.

HARRY H. PAGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio,
and
BRIEF IN SUPPORT OF PETITION.

CHARLES ANDRADE,
Leader Bldg., Cleveland, Ohio,
JOHN H. McNEAL,
HARLAN J. McNEAL,
1967 East 9th St., Cleveland, Ohio,
T. E. McNEVIN,
Union Commerce Bldg., Cleveland, Ohio,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Albert Wieland, also known as A. L. Wieland, individually and as Receiver, respectfully petitions this Court for a Writ of Certiorari to review a judgment of the Supreme Court of Ohio, styled Harry E. Page v. Albert E. Wieland, 137 O. S. 198; 28 N. E. (2d) 583, rendered on July 10, 1940, reversing a decision of the Eighth District Court of Appeals for Ohio and affirming a judgment of the Court of Common Pleas of Cuyahoga County, Ohio.

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

For purposes of convenience the parties will be referred to as they appeared in the Common Pleas Court and as they were referred to by the Supreme Court of Ohio, viz: Harry E. Page, plaintiff, and Albert L. Wieland, defendant.

The plaintiff brought an action in the Court of Common Pleas of Cuyahoga County, Ohio, against the defendant, Albert L. Wieland, as Receiver, to recover damages for injuries sustained by him on the rear stairway of an apart-

ment house resulting from the alleged negligence of the defendant in failing adequately to light said stairway contrary to ordinances of the City of Cleveland, alleged to have been therefor made and provided.

Plaintiff claimed that on March 3rd, 1935, while lawfully ascending the rear stairway "after dark" he stepped on a milk bottle and was thereby thrown down the stairway, sustaining injuries; that there was "no lighting on the rear of the building at all" and that there was then "just light enough to distinguish the stairs." The action was predicated upon certain lighting ordinances of the City of Cleveland, among them Section 1222 (c), (Record, pages 1-7), set out in the amended petition. Issue was joined by an answer in the form of a general denial.

The ordinances were neither introduced nor admitted into evidence in the trial court, were not a part of the Bill of Exceptions in either the Appellate or the Supreme Court of Ohio, and are not included as evidence in the present record. (Record, pages 13, 14; 21-22; 22-35; 42.)

The plaintiff, in order to introduce the ordinances, sought to lay the necessary foundation therefor through the records of the City Clerk; Mr. McNeal, defense counsel, waived this single step in the procedure, stated that he had been advised by plaintiff's counsel that the ordinances were in force, admitted that the ordinances were accurately pleaded, waived nothing else and objected specifically to the competency, relevancy and the materiality of such ordinances. (Record, pages 22, 23.) The court then formally stated for the record the following:

> "The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.
>
> Mr. McNeal: That is true.
>
> The Court: Now all other questions are reserved until after the evidence is heard.

The Court: Of course you are reserving your objections to the ordinances.

Mr. McNeal: Oh, yes." (Record, page 23.)

No further steps were taken by the plaintiff to introduce the ordinances. The trial court thereafter never ruled upon the admissibility of the ordinances or upon the objection to their relevancy, materiality or competency. (Record, pages 22-35.)

Upon this state of the record without indicating whether he sustained or overruled defendant's objection, and without affording the defendant an opportunity during the taking of testimony factually to rebut the applicability, relevancy or materiality of the ordinances, had he ruled adversely upon defendant's objections, the trial judge charged the jury that by reason of an ordinance of the City of Cleveland then in force and effect, it was the duty of the defendant to provide the rear stairway of said building with sufficient light; that if the jury found that the stairway was not sufficiently lighted then "as a matter of law the failure to provide the stairway with sufficient light constituted negligence"; that if the defendant failed to provide sufficient light on the stairway, "then you must find in that respect that the defendant was negligent." (Record, pages 22-35.)

Upon verdict for plaintiff, judgment was entered by the trial court. An appeal was had to the Court of Appeals, which reversed the judgment

> "for error of law in that the trial court failed to rule on the admissibility of the ordinances, although so requested, and the court failed to rule on the objections, and the ordinances were not admitted into evidence and do not appear in the Bill of Exceptions. The court was in error in instructing the jury upon said ordinances because they were not in the record." (Record, page 42.)

On July 10, 1940, the Supreme Court of Ohio reversed the Court of appeals, affirming the judgment of the Common

Pleas Court on the ground that defense counsel's waiver of the "production and preliminary proof of the Municipal ordinance," viz: the waiver of the need for laying the foundation for the introduction of the ordinances, obviated the necessity of putting the ordinances into evidence. The court thus confused, to the defendant's prejudice, the physical production of the ordinances by the plaintiff for their introduction into evidence so as to apprise the jury of the language thereof, holding further that the trial court's failure to rule on the admissibility, relevancy and materiality of the ordinance was not prejudicial to the defendant's rights because of the exception taken by him to the court's charge.

The defendant filed an application for a rehearing in which he resisted the judgment of the Supreme Court on the ground that both the judgment and holding denied him due process of law under the 14th Amendment to the United States Constitution. The Court of Appeals having heretofore ruled favorably to the defendant reversing the judgment of the Court of Common Pleas, the defendant was not obliged to raise this question any earlier in the Supreme Court. In said application defendant contended that the approval of the trial court's failure to rule on defendant's objections deprived him of the right to offer evidence to refute the materiality and applicability of the ordinances, thereby depriving him of an adequate hearing, and that the court's affirmance of a judgment against him based upon ordinances which were not in the record deprived him of substantial rights without due process.

B.

STATEMENT AS TO JURISDICTION.

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344(b); Judicial Code, Section 237(b) as amended by the act of February 13th, 1925.

The judgment of the Supreme Court of Ohio was rendered July 10, 1940. Application for rehearing, timely filed, was denied on the 2nd day of October, 1940. (Record, page 53.)

The following cases are believed to sustain jurisdiction:

Ohio Bell Telephone Co. v. Pub. Util. Com., 301 U. S. 292, 302, 303, 304;
Saunders v. Shaw, 244 U. S. 317;
Missouri v. Gehner, 281 U. S. 313, 320;
Brinkerhoff Faris Trust Co. v. Hill, 281 U. S. 673, 678;
Lovell v. Griffin, 303 U. S. 444;
Chicago, M. and St. Paul Ry v. Coogan, 271 U. S. 472;
Garland v. Washington, 232 U. S. 642, 645;
Rogers v. Peck, 199 U. S. 425, 435.

The jurisdiction of this Court to protect constitutional guaranties is "a jurisdiction conferred by law and designed to protect and maintain the supremacy of the constitution and the laws in pursuance thereof."

Ward v. Love, 253 U. S. 17, 23.

Therefore, this Court has said in *Davis v. Wexler*, 263 U. S. 22, 24

> "that if the Constitution and laws of the United States would be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

To the same effect, *Truax v. Corrigan*, 257 U. S. 312.

C.

THE QUESTION PRESENTED.

Was the defendant denied due process and equal protection under the 14th Amendment to the United States Constitution when because of the court's failure to rule on his objections he was denied the opportunity of offering testimony to rebut the applicability of ordinances which, although neither introduced nor admitted into evidence, were made the basis by the court for charging him with negligence, by reason of which judgment was rendered against him?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The grounds relied on by the plaintiff for the allowance of the Writ are:

1. The decision of the Supreme Court of Ohio is in conflict with the principles relating to due process as laid down in *Saunders v. Shaw,* 244 U. S. 317, 319; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292; *Morgan v. U. S.,* 298 U. S. 468.
2. The precise question whether the guarantee of due process under the 14th Amendment to the United States Constitution precludes a state court from failing to rule upon the admissibility or inadmissibility of evidence, whereby a litigant is deprived of the opportunity of offering rebuttal testimony, has not heretofore been decided by this Court.
3. It is urged that the concept of due process will not permit a court to render a judgment upon assumptions rather than upon facts properly in the record, nor condone its failure to rule on proper and timely objections, and thereby bar the aggrieved litigant from introducing rebuttal testimony.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of this Court to the Supreme Court of Ohio, commanding that Court to certify and send to this Court for review and determination a transcript of the record and all proceedings in the case numbered and styled No. 27,921, Harry E. Page, Plaintiff-appellant, v. Albert L. Wieland, Defendant-Appellee, and that the judgment of said Court be reviewed by this Honorable Court.

Respectfully submitted,

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JOHN H. MCNEAL,
HARLEY J. MCNEAL,
T. E. MCNAMARA,
Counsel for Petitioners.